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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1980

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TONY CURTIS HILL

Petitioner

VS.

STATE OF GEORGIA

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

TONY CURTIS HILL, *

Petitioner, *

vs. *

STATE OF GEORGIA, *

Respondent *

*

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Georgia entered on September 24, 1980 which affirmed his conviction and sentence of death.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 246 Ga. 402, ____S.E.2d____ (1980), and is set out in Appendix A hereto, pp. A1-A8, infra. The judgment of the Superior Court of Baldwin County is unreported, and no opinion was written.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on September 24, 1980 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below

and asserting here deprivations of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following provisions of the Code of Georgia:

Georgia Code §26-2001 Rape

> A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one not more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female.

Georgia Code §26-2018 Statutory Rape

> A person commits statutory rape when he engages in sexual intercourse with any female under the age of 14 years, not his spouse: Provided, that no conviction shall be had for this offense on the unsupported testimony of the female. A person convicted of statutory rape shall be punished by imprisonment for not less than one not more than 20 years.

Georgia Code §26-3I02

> Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death

sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

Georgia Code §26-1101

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

Georgia Code §27-2534.1

...(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

...

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of burglary or arson in the first degree.

...

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

SUBSTANTIAL FEDERAL QUESTION

Was Petitioner's right to trial by jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Petitioner's due process rights as guaranteed by the Fourteenth Amendment to the United

States Constitution and Petitioner's right not to suffer infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution violated by the trial court's failure to charge the jury on the offense of statutory rape which carries a lesser penalty than the offense of rape of which Petitioner was convicted, and which could not be used as one of the aggravating circumstances supporting Petitioner's death sentence for the offense of murder?

STATEMENT OF THE CASE

Petitioner, Tony Curtis Hill, a young black man twenty-three years of age, was found guilty of the offenses of rape and murder of Angela Johnson, a twelve year old black child. The jury was not charged on the offense of statutory rape, although Petitioner requested such a charge (Record in the Supreme Court of Georgia, pp. 34-35). Petitioner was sentenced to life imprisonment for rape (Ga. Code §26-2001) and death for murder (Ga. Code §26-1101) upon the aggravating circumstances Ga. Code §27-2534.1(b)(2)[1] and Ga. Code §27-2534.1(b)(7)[2]. The Supreme Court of Georgia affirmed the convictions and sentences on September 24, 1980. This Court granted an extension for filing a petition for writ of certiorari until December 23, 1980.

During Petitioner's trial his counsel requested that the trial court instruct the jury on the offense of statutory rape. The trial court refused to charge the jury on this offense, although the largely circumstantial

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[1] Supra, at p. 3.

[2] Supra, at p. 3.

evidence presented by the prosecution would have supported a finding and conviction of statutory rape.

There was substantial evidence in the case upon which the jury could have relied in order to return a verdict of statutory rape. The circumstantial evidence that would support a conviction of statutory rape is as follows: The victim was twelve years of age (Tr. P. 339). The testimony of witnesses asserted that Petitioner and the victim were both seen at the West End service station, by the proprietor of that station and his son, at approximately the same time on the day of the offenses (Tr. pp. 205-207, 214-215). The Petitioner and the victim were subsequently seen together by several young boys who were playing on the railroad tracks (Tr. PP. 218-240, passim). The boys testified that the Petitioner and the victim were walking calmly together down the tracks with the Petitioner's arm around the girl's waist (Tr. pp. 219-220, 225, 231-232). The Petitioner and the victim were not strangers, but had known each other for some time (Tr. pp. 246-247). Finally, the pathologist who examined the body of the victim testified that the physical evidence indicated that the victim had engaged in sexual intercourse within hours of her death (Tr. pp. 320-321) and that her sexual organs did not show any "overt signs of trauma." When Petitioner's trial counsel posited that "in other words, then from what you could tell there was very little force involved", the pathologist responded, "That's right." (Tr. p. 337)

Petitioner's trial counsel filed five requests to charge with the trial court on July 16, 1979 (Record in the Supreme Court of Georgia, pp. 34-35). The fifth request to charge submitted by Petitioner reads as follows:

> I charge you that a person commits statutory rape when he engages in sexual intercourse with any female under the age of fourteen years, not his spouse; Provided that no conviction shall be had for this offense of the unsupported testimony of the female.

This request to charge was rejected by the trial court, and no other charge on statutory rape was given by the court.

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Petitioner's counsel requested that the trial court instruct the jury on statutory rape. It refused this request to charge, even though the indictment and evidence presented at trial clearly supported such a charge. Thus, Petitioner was denied the opportunity to have the jury consider the facts of the case with respect to an offense that could carry a lesser penalty than that offense of which he was convicted and which could not be used an an aggravating circumstance to permit imposition of the death penalty.

On appeal to the Georgia Supreme Court, the denial of the request to charge was enumerated as error. See Brief of Appellant in the Supreme Court of the State of Georgia, Enumeration of Error 2, at 35. The Georgia Supreme Court held that statutory rape (Ga. Code §26-2001) was not a lesser included offense of rape (Ga. Code §26-2018), and therefore the constitutional rights of the appellant were not violated by the failure to charge.

REASONS FOR GRANTING THE WRIT

It has long been a well-established principle of law in both state and federal courts that a "defendant is entitled to an instruction on a lesser included offense

if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States, 412 U.S. 205, 208, 36 L.Ed.2d 844, 93 S.Ct. 1993 (1973), cited in Beck v. Alabama, ____U.S.____, 65 L.Ed.2d 392, 401, ____S.Ct.____ (1980). A "lesser included offense" is generally understood by the courts to be a lesser offense necessarily included in a more serious offense with which a defendant is charged. Watson v. State, 116 Ga. 607, 43 S.E. 32 (1902). In Goldin v. State, 104 Ga. 549, 30 S.E. 749 (1898), the Georgia Supreme Court stated that

> . . .There may, of course, be a conviction of a lesser offense than that expressly named in the indictment, where the former is necessarily included in the latter, and also in some cases in which the lesser is not so included in the greater offense but where the language used in the indictment is sufficient to embrace the smaller offense.

Goldin, supra at 550. The rationale behind the venerable notion of a defendant's entitlement to instruction on lesser included offenses has recently been set out by this Court in Beck v. Alabama, supra, 65 L.Ed.2d at 402-403:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Petitioner concedes that the offense of statutory rape as defined in Georgia Code §26-2018 is not a "lesser included offense" of "rape" as defined in Georgia Code §26-2001 and interpreted by the Georgia Supreme Court. A pair of rulings of the Supreme Court of Georgia have together held to this effect, Drake v. State, 239 Ga. 232, 236 S.E.2d 748 (1977), and the ruling on direct appeal in the instant case (see Appendix A). In review of the instant case, the Georgia

Supreme Court stated that "since statutory rape requires proof of an element--age--that forcible rape does not, it cannot be a lesser included offense of forcible rape. Clearly these are two separate offenses, each requiring proof of different elements." (Appendix A, p. A4). Petitioner here asserts, however, that he was entitled to an instruction on statutory rape as a separate offense, supported by the evidence, which carries a lesser penalty and which is not an aggravating circumstance to the offense of murder.

This point is critical to Petitioner's case because the §26-2001 rape conviction returned against him was also found by the jury to be a statutory aggravating circumstance under Georgia Code §27-2534.1(b)(2) (supra, p. 3) to the offense of murder, an aggravating circumstance which allowed the jury to recommend the death penalty for the latter offense. Under Georgia law, statutory rape is neither a capital offense nor an aggravating circumstance which will support the imposition of the death penalty. Presnell v. State, 242 Ga. 131, 243 S.E.2d 496 (1979). There was substantial evidence in the case, as set out supra at p. 5, upon which the jury could have relied in order to return a verdict of statutory rape in lieu of the conviction of forcible rape they did return.

The indictment charged Petitioner Hill in a manner in which the jury could have returned a verdict of statutory rape had the court given a charge on that offense. Although neither the offense of statutory rape nor the age of the victim were alleged in the Petitioner's indictment, under Georgia law this does not prohibit a conviction of statutory rape. In McMath v. State, 55 Ga. 303 (1875), it is specifically stated that "upon the trial of an indictment for rape it is competent to show that the female upon who the crime was alleged to have been

committed was under ten years of age, though the indictment contained no such allegation." Subsequently, the Georgia Code's definition of statutory rape has been changed to make the critical age of the victim fourteen years instead of ten, see Echols v. State, 153 Ga. 857, 113 S.E. 170 (1922), McMath in relevant part has been for the past ninety-five years and is still good law, and it is not necessary that the age of the party alleged to be the victim be included in a rape indictment in order for the party accused to be convicted of statutory rape, regardless of the fact that statutory rape is not literally a "lesser included offense" of forcible rape. See Goldin, supra at p. 7.

Despite the fact that either statutory or forcible rape might have been found by the jury upon the evidence of the case, the court's refusal to charge the jury on statutory rape left the trier of fact with only the opportunity to view the evidence of sexual intercourse in one respect and either convict or acquit the Petitioner on the basis of that single characterization of the offense. Statutory rape was, in the instant case, clearly a reasonable "third option" supported by the evidence even if not literally a "lesser included offense" to rape, and an option of which the jury should have been instructed.

The kind of error caused by the failure to charge in the instant case amounts to a Constitutional deprivation of Petitioner's rights like that recently found by this Court in Beck v. Alabama, ____U.S.____, 65 L.Ed.2d 392, 100 S.Ct.____ (1980). Beck arose out of a situation in which the Alabama trial courts were prohibited by statute from instructing juries in capital cases as to lesser included offenses that had evidentiary support. In Beck, the Supreme Court of the United States held that under the due process clause of the Fourteenth Amendment,

the death penalty could not be imposed after a jury verdict of guilt of the capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense and when the evidence would have supported such a verdict. This Court reasoned that the central problem with the Alabama procedure was that

> . . .on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason--its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason--that, whatever his crime, the defendant does not deserve death. In any particular case these two extraneous factors may favor the defendant or the prosecution of they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

Beck, supra at 406.

The Georgia death penalty statute, unlike the Alabama statute, does not foreclose the possibility of the jury returning a verdict of guilty to a non-capital offense. In the instant case, the judge took from the jury the possibility of considering convicting the Petitioner of a less serious offense that could have meant the Petitioner would not have received a death sentence. The distinction, however, is simply a matter of form--the consequences of the failures to charge are the same in both cases. In the Alabama case, Petitioner Beck was deprived of the reasonable possibility of being convicted of a lesser offense by the force of the Alabama statute. Petitioner Hill in this case is being deprived of the same possibility by a judge's refusal to allow the jury to consider convicting him of a reasonable alternative offense. The constitutional deprivation of rights

acknowledged in Beck is the same deprivation Petitioner Hill suffers, and Petitioner's conviction cannot be allowed to stand under these circumstances.

CONCLUSION

Petitioner urges this Court to grant its writ of Certiorari to the Supreme Court of Georgia.

Respectfully submitted,

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36054. HILL v. THE STATE.

BOWLES, Justice.

This is a death case. Defendant was convicted of the forcible rape and murder of a twelve-year-old girl. The jury sentenced him to death for the murder, finding two aggravating circumstances. One, that the offense of murder was committed while defendant was engaged in the commission of another capital felony, to wit: rape. Code Ann. § 27-2534.1(b) (2). Two, that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b) (7). Defendant was sentenced to life for the rape.

The jury was authorized to find the following facts:

Around 11:00 a.m. on the date of her death the victim was observed buying candy at the West End Service Station by the station owner. Shortly thereafter the owner also noticed defendant standing outside the station. The station owner testified that at that time defendant had one arm in a white sling.

At approximately 12:30 p.m. that day the victim and defendant were seen by three witnesses walking together near the place where her body was later found. The witnesses who observed them testified that defendant had one arm around the victim's waist; his other arm was in a white sling. About an hour later defendant was again seen at the West End Service Station. The station owner testified that defendant was "talking filthy and wild, crazy . . ." "about how he had killed somebody over some change or something or other." The station owner noticed that defendant had bleeding scratches on his face and neck and did not have on the arm sling he had been wearing earlier. Defendant responded to questions concerning the scratches by saying that he had fallen into some briars. A short while later defendant told some neighbors that he had gotten scratched when he fell into briars while walking in the woods.

Several hours after these events occurred defendant telephoned the sheriff's office and told his brother, a deputy sheriff, that he had discovered a human body while walking through the woods. Because the body had been found inside the city limits of Milledgeville the Milledgeville police were called in. Defendant led a search party to an

APPENDIX A

area of dense undergrowth where, about 15 feet off the trail, the body of the victim was found. The body was almost completely covered with pine straw. Law officers testified that the covered body was not immediately recognizable as human because it was so well concealed.

Police officers uncovered the body and asked defendant if he recognized the victim. Defendant twice denied knowing "that broad," although he later admitted he was well-acquainted with her. Features of the victim were not so distorted as to render her unrecognizable.

The victim had been bludgeoned to death. She sustained massive injuries to the abdominal area, including a ruptured spleen and pancreas. Three ribs had been broken. Both sides of the victim's head were severely bruised and her brain was badly swollen. Fingernail marks were found on her face and chest. Blood was discovered on the trail leading to the body and on two trees, approximately two and one-half feet apart, at a height of three and one-half feet, indicating that the victim had been beaten up against the trees. The medical examiner testified it would have taken 5 - 15 minutes for the victim to die and that she would have experienced considerable pain.

When found the victim was clad only in short brown pants. Two garments tied one arm to her chest; her other arm was free. The autopsy revealed non-mobile sperm and a high level of acid phosphatase; the medical examiner concluded that the victim had engaged in sexual intercourse within twelve hours prior to her death. No massive injuries to her genitalia were found although some trauma around the vaginal opening was sustained.

Since defendant had reported his discovery of the body he was questioned by the police as to the circumstances under which he discovered the body. Upon noticing the scratches on defendant's neck the police became suspicious of him and read him his Miranda rights. Defendant made a voluntary statement to the effect that he had received the scratches on his neck while leading the search party to the body. Defendant also told police that he had either been with friends or at his home all day until he discovered the body.

The police obtained from defendant's mother clothes that defendant had worn earlier on the day of the murder. At first defendant denied that the clothes were his, but at trial admitted that they belonged to him. The shirt was covered with blood, but was so soiled that the lab technicians were unable to get an exact blood type due to bacterial interference. Both technicians did testify that the blood on the defendant's shirt was conclusively not that of defendant, but it was determined that it could have been that of the victim. Defendant testified that the blood on his shirt came from bleeding

sores on his body. Fingernail scrapings taken from the victim revealed human blood, but of an amount too small to type.

Police found a white arm sling near the victim's bicycle. An officer fastened it so that it could not be adjusted and asked defendant if he would try it on. Defendant agreed. The officer testified that it was "a perfect fit." Defendant denied that the sling belonged to him.

Defendant alleges that the trial court erred in overruling his motion for a new trial on the general grounds.

I. Defendant first argues that the evidence adduced at trial does not support a conviction of forcible rape. There are three elements to this offense. "A person commits [forcible] rape when he has [1] carnal knowledge of a female, [2] forcibly and [3] against her will." Code Ann. § 26-2001. At trial the medical examiner testified that the victim had experienced sexual intercourse within twelve hours of her death. The victim's mother testified that the victim had been in her presence for 36 consecutive hours prior to her leaving the house at 11:00 a.m. on the morning of her death. The victim's age in this case indicates that, as a matter of law, the intercourse was non-consensual and "against her will." *Drake v. State*, 239 Ga. 232 (236 SE2d 748) (1977). Due to the death of the victim there is no direct evidence available as to the use of force in committing the offense. However, the evidence showed that the victim had been severely beaten about the head, chest and abdomen; that one arm was bound to her chest by two garments; that her chest was covered with fingernail marks; that three ribs had been broken; and that there was evidence of some trauma around the genital area. Additionally defendant's neck was badly scratched and traces of human blood were found under the victim's fingernails. These facts would have authorized a rational trier of fact to conclude that the defendant had used force in raping the victim. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). We conclude that there was sufficient evidence to support a conviction of forcible rape. See *Spraggins v. State*, 240 Ga. 759 (243 SE2d 20) (1978).

II. Defendant next contends that his conviction for murder should be reversed due to insufficient evidence. Defendant was observed by three witnesses walking with the victim on the day of her murder, wearing a white arm sling. A short while later defendant was seen acting "crazy" and "talking about how he had killed somebody." At this time defendant's neck was badly scratched and he was not wearing his white arm sling. A white sling fitting defendant's arm was found near the victim's bicycle. Traces of blood were found under the fingernails of the victim. The shirt defendant had been wearing on the day of the victim's death was covered with blood which was found

to be conclusively not that of the defendant but could have been that of the victim. When asked by the police if he could identify the victim, defendant twice stated that he did not know her, although the evidence showed they were well-acquainted. Defendant also testified that he stumbled across the body while walking through the woods, yet the evidence at trial showed that the body was well concealed and could not be seen from the path in the woods. This evidence would authorize the jury's finding that defendant murdered the victim. Jackson v. Virginia, supra. Therefore, there is no merit to this argument.

III. Defendant contends that the trial court erred in refusing to charge the jury on the offense of statutory rape. Defendant argues that the evidence is sufficient to raise the issue of "whether the intercourse which [the victim] had with someone could have been statutory rape." Defendant cites *McFall v. State*, 235 Ga. 105, 107 (218 SE2d 839) (1975) for the proposition that it is "incumbent upon the court to instruct the jury to find either statutory rape or forcible rape where both are in issue" in a case where the alleged victim has not reached the age of consent. However, we discredited *McFall* in *Drake v. State*, supra. In *Drake* we said "[w]hen an act of sexual intercourse with a girl under 14 is shown, statutory rape is shown. If the state desires to convict a defendant of forcible rape, it must prove the element of force by *acts* of force (or mental coercion) — age has nothing to do with it. Considerations of 'consent' and 'force' and 'against her will' are irrelevant in a statutory rape case, and the age of the victim is irrelevant in a forcible rape case except insofar as it may show her incapable of giving consent and thereby supply the 'against her will' element," supra, at 233. The elements of force and "against her will" are not synonymous.

Nor can it be said that statutory rape is a lesser included offense of forcible rape. In statutory rape the State must prove two elements: an act of sexual intercourse with a female, not the defendant's spouse and that the victim is under the age of 14. Code Ann. § 26-2018. As stated above, the elements of force and consent are irrelevant. To prove forcible rape the State must show that (1) the defendant had carnal knowledge of a female (2) forcibly and (3) against her will. Code Ann. § 26-2001. Although age of the victim may be incidentally proved in the evidence of a forcible rape case, proof of the victim's age is not necessary to establish a case of forcible rape. Thus, since statutory rape requires proof of an element — age — that forcible rape does not, it cannot be a lesser included offense of forcible rape. Clearly these are two separate offenses, each requiring proof of different elements.

In a case where, as here, the State does not allege the victim's age

in an indictment charging forcible rape, and the State establishes all elements of forcible rape it is not necessary to charge the jury on statutory rape. Therefore, there is no merit to this argument.

IV. Defendant next argues that the trial court erred in admitting as State's Exhibits No. 28 and No. 29 two color slides which were taken during the autopsy performed on the victim. The slides depicted damage to the victim's head, specifically hemorrhaging and swelling of the brain. Defendant contends that these slides were prejudicial and inflammatory and that they added nothing probative to the record. Defendant states that he would have no objection to the admission of photographs taken of injuries to the victim's abdomen since the medical examiner testified that abdominal injuries were the cause of death. However, defendant argues that only those photographs which illustrate the injuries which resulted in the death of the victim should be admitted into evidence, and that since injuries to the victim's head did not result in death, photographs of them should be excluded.

We do not accept this argument.

Whether the jury was influenced by passion and prejudice in imposing the death sentence will be considered in our sentence review of this case. "There is abundant case authority that photographs showing an accurate and correct representation of a person or an object material to the issues in the case are admissible. The location of wounds is material to the issues in a homicide case, and photographs should not be excluded simply because there is other evidence of the location of the wounds. To rule otherwise would unfairly preclude the state from establishing a material fact by more than one source of evidence." *Floyd v. State*, 233 Ga. 280, 284 (210 SE2d 810) (1974). See also, *Moore v. State*, 240 Ga. 807 (243 SE2d 1) (1978); *Davis v. State*, 240 Ga. 763 (243 SE2d 12) (1978).

"Georgia law is abundantly clear that a photograph which is relevant and material to the issues in the case is not excludable on the ground that it would inflame the minds of the jurors to see it." *Mooney v. State*, 243 Ga. 373, 394 (254 SE2d 337) (1979); *Stevens v. State*, 242 Ga. 34 (247 SE2d 838) (1978). See also, *Tucker v. State*, 245 Ga. 68 (263 SE2d 109) (1980).

"The photographs were made during the autopsy and depict the extent and nature of the wounds suffered by the victim. The location of the wounds is material to the issues in a homicide case and the trial court did not err in admitting them though there was other evidence from the examining physician as to the nature and location of the wounds." *Lamb v. State*, 241 Ga. 10, 13 (243 SE2d 59) (1978).

The photographs in this case were properly admitted to illustrate the testimony of the medical examiner and to show the

extent of victim's wounds, which bear both on the issue of murder and of forcible rape.

V. Defendant next contends that the trial court erred in admitting into evidence a statement made by defendant to police officers after defendant had received Miranda warnings in that the statement was hearsay. Defendant's statement purported to account for his whereabouts on the day of the murder and stated that he had received the scratches on his neck while leading the search party through briar patches to the victim's body. The police officer who took this statement from defendant read it to the jury at trial, deleting defendant's statement that he wished to answer no further questions. Subsequently the service station owner testified that he had observed the scratches on defendant's neck some hours before defendant had lead the search party to the body.

A statement made by a suspect to police officers, although hearsay, may be admissible. However "[a]ll admissions shall be scanned with care, and confession of guilt shall be received with great caution." Code Ann. § 38-420. Here defendant had received Miranda warnings prior to making his statement. The trial court conducted a Jackson v. Denno hearing and determined that defendant had voluntarily made the statement. The jury was instructed that they must find the defendant's statement to have been voluntarily made before they could consider it.

The statements made by defendant to police were not incriminating on their face. However, when directly contradicted by statements made by defendant to another witness these statements became incriminating and were competent evidence for the jury to consider. See *Birks v. State*, 237 Ga. 861 (230 SE2d 294) (1976). The trial court did not err in admitting defendant's statement.

VI. Finally defendant avers that the trial court erred in charging the jury that defendant's statement to the police was "an alleged incriminating statement or confession if [the jury found] it to be so." Defendant argues that the trial court erred in charging the jury that his statement could have been a confession when there is no evidence to support such a charge.

The trial court gave a lengthy charge on the admissibility of and weight to be given to defendant's statement to police. The trial judge consistently qualified the nature of defendant's statement by instructing the jury that it was "an *alleged* incriminating statement or confession *if you find it to be so.*" (Emphasis supplied.) The court charged the jury that before they considered the statement they must determine that the defendant made it freely and voluntarily. The court further instructed the jury that even if they concluded that the statement was voluntarily made, they should nonetheless regard it

with great caution in determining whether it was "truthful" and "accurately recorded," and that they alone should decide what weight to give the statement under the general rules of evidence.

Although it is clear that the defendant's statement to the police did not amount to a confession of the crime, *Robinson v. State*, 232 Ga. 123 (205 SE2d 210) (1974), it is also apparent that the court did not charge fully on the law of confession, but rather cautioned the jury to carefully scrutinize the defendant's statement and to consider it as they would any other statement admitted into evidence.

A study of the record in this case reveals overwhelming evidence of defendant's guilt. If we consider only defendant's statement to the police to be the "confession" referred to in the charge, we find that it may have been error for the court to use even incidentally the word "confession" because the statement to the police was not a confession. On the other hand, we have carefully weighed the harm of the possible error in view of the entire charge given by the court and have likewise considered its harm after considering all the evidence presented at trial. "Given the collateral nature of the charge, the considerable strength of the evidence supporting the verdict and the defendant's demonstrated lack of credibility," we conclude that it is highly probable that the use of the word "confession" did not contribute to the verdict and judgment. *Mimbs v. State*, 144 Ga. App. 698 (241 SE2d 494) (1978); see also, *Johnson v. State*, 238 Ga. 59 (230 SE2d 869) (1976).

Last, at the conclusion of the charge the court inquired of defendant's counsel whether he had any exceptions to the charges as given. Counsel replied that he had none. We find that defendant "has waived his right to enumerate error by failing to respond to the court's inquiry on any objections to the charge." *White v. State*, 243 Ga. 250, 251 (253 SE2d 694) (1979).

Therefore, there is no merit to this argument.

Sentence Review.

The death penalty imposed in this case must conform to the standards set forth in Code Ann. § 27-2534.1 to authorize affirmance. This court must determine in conformance with Code Ann. § 27-2537 whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence supports the jury's findings of the statutory aggravating

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Though, it should also be noted that on the day of the murder, shortly after the defendant had been seen with the victim, he was heard to remark that he had "killed somebody over some change."

circumstances, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Upon review of the record and transcript in this case we find that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor.

The jury found the following statutory aggravating circumstances beyond a reasonable doubt:

(1) The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: rape, Code Ann. § 27-2534.1 (b) (2).

(2) The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim. Code Ann. § 27-2534.1 (b) (7).

The evidence supports the jury's finding of Code Ann. § 27-2534.1 (b) (2) beyond a reasonable doubt. See Division 1 herein. Jackson v. Virginia, supra.

However, in that the sentence of death herein is partially supported by a finding of Code Ann. § 27-2534.1 (b) (7), this sentence must be reviewed in light of the recent United States Supreme Court decision in Godfrey v. Georgia, 446 U. S. - (100 SC 1759, 64 LE2d 398) (1980). In order for Code Ann. § 27-2534.1 (b) (7) to be constitutionally applied in a given case, the evidence presented at trial must satisfy the criteria set forth in *Hance v. State*, 245 Ga. 856 (268 SE2d 339) (1980), as they apply to the specific factual situation.

We find that the murder was outrageously or wantonly vile, horrible or inhuman in that this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. The victim was not killed instantaneously. Rather, under the evidence of this case death took between five and fifteen minutes. This was not a domestic murder but a savage sexual attack upon a 12-year-old child perpetrated by a 23-year-old male. Unlike the murder in *Godfrey*, supra, the victim was not threatening to the appellant nor subjecting him to emotional trauma. He attempted in every way to conceal his crime. Under the evidence of this case the victim, a 12 year old female was beaten to death in the process of a forcible rape. The evidence set forth in this opinion establishes beyond a reasonable doubt that the victim was subjected to serious physical abuse prior to

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In that the jury returned multiple aggravating circumstances, Code Ann. §§ 27-2534.1 (b) (2) and 27-2534.1 (b) (7), under our decisions, the death penalty herein may be upheld upon Code Ann. § 27-2534.1 (b) (2). *Gates v. State*, 244 Ga. 587 (261 SE2d 349) (1979). *Burger v. State*, 245 Ga. 458 (265 SE2d 790) (1980).

death. Torture occurs when the victim is subjected to serious physical abuse before death. *Hance v. State*, supra. The victim was also subjected to serious sexual abuse which under the evidence of this case constituted serious physical abuse. *House v. State*, 232 Ga. 140 (205 SE2d 217) (1974), *Hance v. State*, supra.

In determining whether the evidence shows "depravity of mind" the age and physical characteristics of the victim may be considered. *Hance v. State*, supra. A finding of torture will support a finding of depravity of mind. *Hance v. State*, supra.

This court finds that the evidence factually substantiates and supports both the jury's finding of Code Ann. § 27-2534.1 (b) (7) and the sentence of death beyond a reasonable doubt and that the section is constitutionally applied under the evidence in this case. Jackson v. Virginia, supra, Godfrey v. Georgia, supra, *Hance v. State*, supra.

We have thoroughly reviewed the instructions of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1977) and *Hawes v. State*, 240 Ga. 327 (240 SE2d 833) (1977). In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support affirmance of the death penalty. Appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed. All the Justices concur, except that as to Divisions 3 and 6, Hill, J., concurs in the judgment only.

Argued April 15, 1980 — Decided September 24, 1980.

Murder, etc. Baldwin Superior Court. Before Judge Duke.

Robert M. Boulineau, for appellant.

Joseph H. Briley, District Attorney, Arthur K. Bolton, Attorney General, Michael R. Johnson, Assistant Attorney General, for appellee.

APPENDIX

House v. State, 232 Ga. 140 (205 SE2d 217) (1974), *Gibson v. State*, 236 Ga. 874 (226 SE2d 63) (1976); *Griggs v. State*, 241 Ga. 317 (245 SE2d 269) (1978); *Presnell v. State*, 241 Ga. 49 (243 SE2d 496) (1978); *Johnson v. State*, 242 Ga. 649 (250 SE2d 394) (1978); *Ruffin v. State*, 243 Ga. 95 (252 SE2d 472) (1979); *Collins v. State*, 244 Ga. 291 (253 SE2d 729) (1979); *Bowen v. State*, 244 Ga. 495 (260 SE2d 909) (1979); *Tucker v. State*, 244 Ga. 721 (261 SE2d 635) (1979); *Patrick v. State*, 245 Ga. 417 (265 SE2d 553) (1980); *Thomas v. State*,

245 Ga. 688 (266 SE2d 499) (1980).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TONY CURTIS HILL, :

Petitioner, :

v. : No. 80-5933

STATE OF GEORGIA, :

Respondent :

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Tony Curtis Hill, who is now held in the Georgia Diagnostic and Classification Center at Jackson, Butts County, Georgia, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis.

Affidavit of Petitioner in support of this motion is attached hereto.

BETTYE H. KEHRER

Attorney for Petitioner

1012 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

(404) 577-1697

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980 80-5933

TONY CURTIS HILL,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, TONY CURTIS HILL, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes _____ No ✓

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. FEBRUARY 1979 $3 [illegible]

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No ✓

a. If the answer is yes, describe the property and state its approxamate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Tony C Hill

TONY CURTIS HILL

STATE OF GEORGIA
COUNTY OF _____

SUBSCRIBED AND SWORN TO
before me this the 11 day of March, 1980.

Notary Public, Lamar Co., Ga.
My Commission Expires SEPT. 20, 1983

My Commission expires:

NO. 80-5933

RECEIVED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TONY CURTIS HILL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

Whether statutory rape was a lesser included offense of the crimes charged in the indictment, and whether, therefore, the trial court's failure to charge the jury on this substantive offense denied Petitioner his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution.

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STATEMENT OF THE CASE

Petitioner was indicted by the Baldwin County Grand Jury during the July Term of 1979, for the forcible rape and malice murder of Angela Johnson. (Trial Record, hereinafter "R," at page 22). Petitioner was arraigned on July 12, 1979, and pled not guilty. (R. 22). Following his jury trial, Petitioner was found guilty on both counts and was sentenced to death. (R. 36-38). The aggravating circumstances found by the jury were as follows: (1) the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: rape; (2) the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. (R. 37).

Petitioner filed a motion for new trial, which was denied by the trial court on December 28, 1979. (R. 49-58). Petitioner's notice of appeal was filed on January 25, 1980. (R. 1-2).

On September 24, 1980, the Georgia Supreme Court, in a unanimous opinion by Justice Bowles, affirmed Petitioner's conviction and sentence. See Hill v. State, 246 Ga. 402, ___S.E.2d ___ (1980). After an extension was granted to Petitioner's counsel, Petitioner filed the instant petition for certiorari on or about December 19, 1980.

STATEMENT OF THE FACTS

At approximately 11:00 a.m. on Sunday, April 22, 1979, 12 year old Angela Johnson left her home in Milledgeville, Georgia, to go to the store. (T. 359). She rode her bicycle to the West End service station, which functioned as both a store and a gas station. According to the owner, Winston Harrington, Angela arrived some time between 11:30 a.m. and noon. (T. 206, 214). Also present at the station was the Petitioner, 23 year old Tony Curtis Hill. (T. 205, 214). Petitioner had his arm in a sling. (T. 207). Angela made a purchase and rode away. Shortly thereafter, Mr. Harrington noticed that Petitioner, too, had gone. (T. 206, 209, 211).

A short distance away, Wayne Gibbs, Walter Hair (age 14), and Scott Harrison (age 12) were playing on some railroad tracks. (T. 218, 229). At approximately 12:30 p.m., the boys saw a man and a girl walking toward them down the tracks. The man had a bad eye, had "marks" on his face, and had his arm firmly around the girl's waist. (T. 219, 223, 226, 230, 231, 240). The girl was Angela Johnson; the man was Tony Curtis Hill. (T. 220, 230-232). Later the boys found Angela's bicycle and an arm sling further down the tracks. (T. 221, 222, 233).

Between 1:00 p.m. and 1:30 p.m., Petitioner returned to the West End service station, alone. (T. 207, 242, 248). He was no longer wearing a sling, and he had scratches on his neck. (T. 207, 208, 250). According to Winston Harrington, Petitioner was "acting kind of wild and crazy." (T. 207). Petitioner explained the scratches by saying that he had fallen into some briars. (T. 207).

Between 1:45 p.m. and 2:00 p.m., W. C. Russell and Petitioner's sister, Cora Hill, saw Petitioner at his home, located approximately three blocks from the service station. Mr. Russell noticed scratches on Petitioner's neck; once again, Petitioner said he had gotten drunk and had fallen in some bushes. (T. 176, 251-252, 254, 256).

Some time after 2:15 p.m., Alfonso Wright (age 9) and Cornelius Wright, Jr. (age 10) saw Petitioner walking behind the Baldwin County Hospital, headed in the general direction of a local discount department store, the TG&Y. (T. 258, 259, 261-264).

Some time during the middle of the afternoon, Petitioner called his brother, Deputy Sheriff Johnny Hill, and told him he had discovered a body in the woods. (T. 289, 367, 401). Deputy Hill notified Deputy Sheriff Lane Lingold, and a search party was hastily convened at the TG&Y. (T. 289). The body was located shortly thereafter. It was found some 17-18 feet off a trail in dense undergrowth. (T. 184, 187, 188). There was blood on the trail, as well as on several trees. (T. 154, 155). A comb with several negroid-type hairs in it was found some 17 feet from the body. (T. 387-389). When found, the body was almost completely covered with pine straw and was not immediately recognizable as a human body. (T. 187, 188, 291, 295, 368).

Because the body was discovered within the city limits of Milledgeville, the Milledgeville police were notified. Detective Captain James D. Josey and Detective Herman Waller, Jr., were both called to the scene. (T. 552, 153, 186). The body, uncovered

from its shallow grave, proved to be that of Angela Johnson. (T. 155). When found, she was wearing only brown cutoff pants. Two garments were tied around one arm. (T. 154). Her head and face were bruised and bloody. (T. 155, 164). Petitioner, who was still at the scene, was asked if he recognized the body. He replied that he did not. (T. 284). Petitioner accompanied Detective Waller to police headquarters to make a statement concerning his discovery of the body. Petitioner was not yet a suspect. (T. 155, 156, 188, 189).

Angela's body was taken to the hospital, where an autopsy was performed by Dr. James B. Hurst. (T. 312). Injuries had been sustained by the victim to her head, neck and body. There was some hemorrhaging to the scalp, and the brain was swollen. (T. 313-314). Both sides of the victim's head were bruised. (T. 313). Angela's body was also badly bruised and scratched, and three ribs were fractured. (T. 313). There had been massive internal bleeding, and the victim's spleen and pancreas had ruptured. (T. 315-316).

Dr. Hurst testified that the victim's wounds had been inflicted by "blunt force trauma." (T. 317). In short, Angela had been beaten to death. (T. 318, 319). Dr. Hurst testified further that it would have taken several minutes for the victim to die, that the victim would have experienced pain, and that the death "wouldn't have been pleasant." (T. 319).

The autopsy also revealed that the victim had engaged in sexual intercourse within 12 hours previous to her death. (T. 320, 321). Although there was some trauma found around the vaginal opening, there were no massive injuries to the victim's genitalia. (T. 337).

When he arrived at police headquarters, Detective Waller noticed that there were scratches on Petitioner's neck. (T. 189). Becoming suspicious, the detective had Petitioner read his Miranda rights. (T. 189, 190). Petitioner agreed to make a statement and answer questions.

In his statement, Petitioner said that, while walking through the woods to the John Milledge Motel he found a body in the woods. He also stated that after seeing the body, he ran to the TG&Y and called his brother, Deputy Sheriff Johnny Hill. (T. 201). Following Petitioner's statement, Detective Waller asked Petitioner several questions. In response to the questions, Petitioner stated that he had gotten up at approximately 8:00 that morning, had visited friends and done some drinking, and that he had changed his clothes some time during the day. Petitioner also stated that his neck had gotten scratched while he was leading his brother and the sheriff to the body. (T. 202). When Detective Waller asked Petitioner whose body was found in the woods, Petitioner requested that questioning terminate, and no further questions were asked. (T. 193).

Johnny Hill went to Petitioner's home and retrieved some clothes from Petitioner's mother and sister which had been worn by Petitioner that morning. (T. 203, 204, 266, 280, 283). Petitioner initially denied the clothes were his, (T. 284), but at trial admitted that he had worn them the morning of the murder. (T. 403). Included in the clothes was a shirt, which contained several blood stains. (T. 300, 302).

Captain Josey took command of the investigation. He located the victim's bicycle through Walter Hair, Wayne Gibbs and Scott Harrison. (T. 157, 162). Fingerprint tests were run on the

bicycle, which yielded negative results. (T. 162). Near the location of the bicycle, Captain Josey found an adjustable arm sling. (T. 272). Securing the sling so that it couldn't be readjusted, Captain Josey placed it on Petitioner's arm. It fit perfectly. (T. 272, 417).

Fingernail scrapings were taken from the victim, and blood samples were taken from both the victim and Petitioner. All tangible evidence was turned over to the State Crime Lab for analysis. (T. 280, 281, 282). The fingernail scrapings were found to contain blood, but it was too small of a sample to allow for typing. (T. 299). Enzyme analysis was performed on Petitioner's shirt. It was determined that the blood on his shirt was not Petitioner's and that it could have been the victim's. (T. 305-307, 310).

The State called nineteen witnesses during its case in chief. The Defense called three witnesses, including Petitioner himself. Petitioner testified that he spent the morning and early afternoon of April 22, 1979, visiting friends, drinking, and making several trips between various locations and his home. (T. 391-395). He then stated that he decided to walk through the woods to the John Milledge Motel and that, while walking, came across the victim's body located close to some marijuana plants. (T. 396, 399). Petitioner denied seeing Angela at all on April 22; he denied being on the railroad tracks or behind the hospital that day; he claimed that his neck was not scratched until he led the sheriff's deputies to the body; he denied that the sling was his; he asserted that the blood stains on his shirt were his; he explained that he originally denied knowing the identity of the victim because the body was unrecognizable; and he denied committing any crime. (T. 395, 402, 403, 407-409, 414).

REASONS FOR NOT GRANTING THE WRIT

THE TRIAL COURT PROPERLY DENIED PETITIONER'S REQUEST THAT HE CHARGE THE JURY ON THE SUBSTANTIVE OFFENSE OF STATUTORY RAPE.

In his sole contention in the instant petition, Petitioner asserts that the trial court should have charged the jury on the offense of statutory rape, and that its failure to do so deprived him of his rights under the Sixth, Eighth and Fourteenth Amendments of the Constitution.

The facts which underlie this contention are not really in dispute. The indictment on which Petitioner was tried alleged that he committed the offense of forcible rape, and did not mention the age of the victim. (R. 21). Prior to trial, Petitioner's counsel filed a written request that the trial court charge the jury the substance of Ga. Code Ann. § 26-2018,[1/] but the request was denied by the court. (R. 35).

On direct appeal, Petitioner contended that the failure to charge the Code Section constituted reversible error because statutory rape was a lesser included offense of forcible rape. The Georgia Supreme Court disagreed, holding that statutory rape was not a lesser included offense of forcible rape as a matter of law, and under the facts of the case, was not a lesser included offense as a matter of fact. See Hill v. State, supra.

1/ Ga. Code Ann. § 26-2018 states as follows: "A person commits statutory rape when he engages in sexual intercourse with any female under the age of 14 years, not his spouse: Provided, that no conviction shall be had for this offense on the unsupported testimony of the female. A person convicted of statutory rape shall be punished by imprisonment for not less than one nor more than twnety years."

In his petition, Petitioner concedes that, under Georgia law, statutory rape is not a lesser included offense of forcible rape, but he contends that he "was entitled to an instruction on statutory rape as a separate offense, supported by the evidence, which carries a lesser penalty and which is not an aggravating circumstance as to the offense of murder." (Petitioner's petition, at pp. 7-8). In support of this contention, Petitioner asserts that "the jury could have returned a verdict of statutory rape had the court given a charge on that offense." (Petitioner's petition, at p. 8).

That is most emphatically not the case. If an offense is not alleged in an indictment, and is not a lesser included offense of a charge alleged in the indictment, either as a matter of law or as a matter of fact, then a defendant may not be convicted of that offense. Such has been the law of Georgia for almost 100 years. In Goldin v. State, 104 Ga. 549, 30 S.E. 749 (1898), the Georgia Supreme Court stated:

> "It is an elementary principle of criminal procedure that no person can be convicted of any offense not charged in the indictment. There may, of course, be a conviction of a lesser offense than that expressly named in the indictment, where the former is necessarily included in the latter, and also in some cases in which the lesser is not so included in the greater offense but where the language used in the indictment is sufficient to embrace the smaller offense." 104 Ga. 550.

See also Wells v. State, 127 Ga. App. 109, 192 S.E.2d 567 (1972); McFall v. State, 235 Ga. 105, 218 S.E.2d 839 (1975),(Ingram, J., dissenting).

In the instant case, it is clear that statutory rape is not a lesser included offense of forcible rape as a matter of law. Petitioner concedes as much, and the case law is clear. See Hill v. State, supra; Drake v. State, 239 Ga. 232, 236 S.E.2d 748 (1977). In addition, in this case, statutory rape is not a lesser included offense of forcible rape as a matter of fact. In its opinion, the Georgia Supreme Court stated:

> "In a case where, as here, the state does not allege the victim's age in an indictment charging forcible rape, and the state establishes all elements of forcible rape it is not necessary to charge the jury on statutory rape." Hill v. State, supra, 246 Ga. 405-406.

Had the indictment alleged the age of Angela Johnson, therefore, the State would have been required to prove age, as in a prosecution for statutory rape, and therefore, the elements being identical, statutory rape would have been a lesser included offense of the forcible rape alleged in the indictment. In the instant case, however, there being no allegation as to age, the elements required to be proved by the State were separate and distinct from the elements of statutory rape, and therefore, the one is not a lesser included offense of the other.

In short, therefore, Petitioner could not have been convicted of statutory rape, simply because the indictment was worded in such a way as to not allege statutory rape. Had the jury convicted Petitioner of statutory rape, he would have been entitled to a reversal, because the verdict would have been contrary to law, just as in Goldin[2/] and Wells.[3/]

Petitioner relies on McMath v. State, 55 Ga. 303 (1875) and Beck v. Alabama, ___U.S. ____, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), in support of his position. Contrary to Petitioner's assertions, however, McMath is no longer good law in the State of Georgia. McMath, and cases like it, such as McFall v. State, 235 Ga. 105, 218 S.E.2d 839 (1975), were disapproved by the Georgia Supreme Court in its landmark opinion of Drake v. State, 239 Ga. 232, 236 S.E.2d 748 (1977). In that case, the court clearly stated that the elements of statutory rape and forcible rape were separate and distinct. The court, in removing some ambiguities from older cases, stated that the elements of forcible rape were sexual intercourse, force, and lack of consent, whereas the elements of statutory rape were simply sexual intercourse and the age of the victim. The court went on to say that age may be probative of issue of consent in a forcible rape case, but

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2/ In Goldin v. State, 104 Ga. 549, 30 S.E. 748 (1898), the defendant was charged with assault with intent to commit a rape. After a jury trial, the jury convicted him of assault and battery. On appeal, the Georgia Supreme Court reversed the conviction, holding that battery was not a lesser included offense of assault with intent to rape, and the wording of the indictment precluded the jury from convicting the defendant of battery.

3/ In Wells v. State, 127 Ga. App. 109, 192 S.E.2d 567 (1972), the defendant was charged with, and convicted of, burglary. He contended on appeal that the court should have charged the jury on the substantive offense of receiving stolen goods. In affirming the conviction, the Georgia Court of Appeals held that receiving stolen goods was not a lesser included offense of burglary, and that the defendant "could not have been convicted of receiving stolen goods and it was therefore not error to fail to charge this offense." 127 Ga. App. at 110.

was not an essential element of forcible rape. In so stating, the court criticized "very old cases (which) blended concepts of nonconsent and force." 239 Ga. 233. McMath is one such case in which the elements of force and consent were confused. See McMath v. State, supra, 55 Ga. at 308. Consequently, McMath is no longer the law in Georgia, and should not be utilized by this Court in evaluating its decision on certiorari.

Respondent also relies on the recent case from this Court of Beck v. Alabama, supra. Respondent has no quarrel with the holding in Beck, but it is clear that that case is not on point with the instant situation. In Beck, the court held that the Alabama statute which prohibited a jury from considering a lesser included offense in a capital trial, was unconstitutional, because it rendered the jury's deliberative process arbitrary and unpredictable. In this case, however, the jury was not precluded from considering lesser included offenses. The reason it was not allowed to consider statutory rape was the aforementioned fact that statutory rape was not a lesser included offense of the forcible rape charged in the indictment. Consequently, Beck has no applicability.

Petitioner urges this Court, however, to considerably expand its holding in Beck. In that case, the court spoke of the "three options" possessed by a jury in determining guilt or innocence: (1) find the defendant guilty as charged; (2) acquit the defendant of the offense charged; and (3) find the defendant guilty of a lesser included offense. In this case, though, Petitioner urges that the Court mandate a fourth option, that is, that the jury be empowered to return a verdict of guilty of a charge nowhere alleged in the indictment, and nowhere contained as a lesser included offense of the charges that were alleged in the indictment. Such a holding would be staggering.

In indicting Petitioner, the district attorney, in his discretion, chose to charge Petitioner with malice murder and forcible rape. He chose not to indict Petitioner for statutory rape, aggravated assault, or any other crime which the facts might have tended to show but which was not included in the indictment. This is a well recognized function of the prosecutor, and it protects both the interests of the public and the interests of the defendant. It is axiomatic that a criminal defendant is absolutely entitled to know what he is charged with, so that he may properly frame a defense. He knows when he goes to trial that he does not have to face every conceivable criminal charge raised by the evidence, but only those charges alleged with sufficient particularity in the indictment. In this case, the allegations contained in the indictment were for malice murder and forcible rape. Perhaps Petitioner wishes that he had been charged with statutory rape, rather than forcible rape; it would not be unreasonable to assume that. Nevertheless, the fact that the State chose not to indict for statutory rape has deprived Petitioner of no cognizable right or privilege under any provision of the Constitution.

CONCLUSION

Since statutory rape was not a lesser included offense of the forcible rape charged in the indictment, the trial court was correct in refusing to give Petitioner's request to charge on that offense. None of his constitutional rights have been violated, and this Court should deny the instant petition for certiorari.

Respectfully submitted,

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